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SUPREME COURT, U. S.

No. 75-7

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In the

Supreme Court of the United States

OCTOBER TERM, 1975

THE GREAT NORTHERN RAILWAY COMPANY and THE NORTHERN PACIFIC RAILWAY COMPANY, corporations,

Petitioners,

vs.

THE PULLMAN COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION OF RESPONDENT, THE PULLMAN COMPANY

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The substance of the single proposition upon which the petition is predicated is that this Court should issue a writ of certiorari because the Seventh Circuit rejected the District Court's interpretation of the Uniform Service Contract without determining first that the District Court's conclusion as to what the parties intended, partially drawn from expert accounting testimony, was "clearly erroneous" within Rule 52(a) of the Federal Rules.

The District Court made sixty-two numbered "findings of fact".[1]

The Seventh Circuit did not set aside any of those findings. Instead, it pointedly affirmed and adopted all of those findings.

The District Court, in ascertaining the meaning of the term "operating expenses" in the Uniform Service Contract, noted that among accountants "operating expenses" is generally defined to include "those expenses incurred in the conduct of the major activities of a business which are generally recurrent in nature and somewhat normal and dependable in their operation". In doing so, it necessarily relied upon petitioners' expert accounting testimony.[2]

The District Court, however, then observed that "expert opinion carries less weight in construing the parties' intent than might otherwise be the case", and held that "once it became clear that Pullman was going to discontinue a segment of its business, separation payments to employees

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[1] While most of the purported facts recited in the petition were also recited in petitioners' Proposed Findings of Fact, many of them were not reflected in the District Court's finding of fact.

[2] We argued to the Seventh Circuit that the definition of "operating expenses" noted by the District Court applies only in the preparation of an income statement, citing Davidson *Handbook of Modern Accounting*, McGraw-Hill Book Co., 1970, pp. 2-20, 3-20; that for purposes of the basic books of Pullman, the primary "operating expense accounts", "operating expenses" means all expenses incurred in the rendition of transportation services, citing Adams, *American Railway Accounting*, Henry Holt and Company, 1918, p. 86; and that the Uniform Service Contract employed the term in the latter, rather than the former, sense.

in that segment of its operations were no longer operating expenses chargeable to the contract railroads".

The Seventh Circuit, commenting that the District Court "disposed of the basic documents we are interpreting in too summary a fashion", did not draw upon the expert accounting testimony in any respect in determining the intention of the parties.

Rather, it looked to the wording of the Uniform Service Contract and the predecessor Uniform Operating Contract, and to authorities holding that separation payments are wages, in concluding that "operating expenses" was intended to include "all" "of Pullman's expenses of conducting its sleeping car business and commissary services", and, therefore, "all" of its separation pay expenses.

In so holding, the Seventh Circuit did not violate Rule 52(a). It did not set aside any finding of the District Court. Instead, it fulfilled its responsibility to reach its own interpretation of the contract on the basis of considerations which it deemed conclusive.

In *Arrow Equipment, Inc.* v. *M-R-S Manufacturing Company*, 416 F.2d 152 (8 Cir., 1969), the Court stated (pp. 154-5):

> "While this Court gives weight to the District Court's interpretation of the provisions of the Dealership Agreement, we are required to reach an independent judgment as to their meaning. The clearly erroneous rule of Fed. R. Civ. P. 52(a) is inapplicable here. United States v. John McShain, Inc., 103 U.S. App. D.C. 328, 258 F.2d 422 (1958), cert. denied, 358 U.S. 832, 79 S.Ct. 52, 3 L.Ed.2d 70 (1958); Republic Pictures Corp. v. Rogers, 213 F.2d 662 (9th Cir. 1954), cert. denied, 348 U.S. 858, 75 S.Ct. 83, 99 L.Ed. 676 (1954)."

See also, *University Hills, Inc.* v. *Patton*, 427 F.2d 1094, 1099 (6 Cir., 1970); *United States* v. *John McShain, Inc.*, 258 F.2d 422, 424-5 (D.C. Cir., 1958), *cert. den.*, 358 U.S. 832 (1958); *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 163 (2 Cir., 1947), *cert. den.*, 333 U.S. 845 (1948).

The Seventh Circuit's decision is not in conflict with Rule 52(a) or with a decision of any other circuit interpreting Rule 52(a).

Nor is the underlying core question of what are "operating expenses" within the Uniform Service Contract one of national and lasting significance. The contract was unique to Pullman's sleeping car business and is likely to remain *sui generis*.

The petition should be denied.

Respectfully submitted,

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